

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHAEL ANDERSON,

NO. : 4:15-CV-5091-EFS

Plaintiff,

v.

CAROLYN COLVIN, Commissioner of  
Social Security.

ORDER GRANTING IN PART AND DENYING  
IN PART PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT

Defendant.

Before the Court are cross motions for summary judgment.

ECF Nos. 17 & 23. Plaintiff Michael Anderson appeals the denial of benefits by the Administrative Law Judge (ALJ). ECF No. 17. Mr. Anderson contends the ALJ erred because she (1) accepted the opinion of the medical expert, but did not discuss and accept all of his opinions; (2) erred in evaluating the opinions of the treating physician; (3) erred in determining that Mr. Anderson could perform past relevant work; and (4) improperly discredited Mr. Anderson's symptom testimony. ECF No. 17. The Commissioner of Social Security ("Commissioner") asks the Court to affirm the ALJ's decision that Mr. Anderson is capable of performing past relevant work. ECF No. 23. After reviewing the record and relevant authority, the Court is fully informed. For the reasons set forth below, the Court remands for further proceedings.

1

1 **A. Statement of Facts<sup>1</sup>**

2 Mr. Anderson was born in 1971. Transcript of admin. hrg. ("Tr.")  
 3 at 30. He completed high school and two years of college. Tr. at 30. Mr.  
 4 Anderson has been diagnosed with a number of physical conditions  
 5 including degenerative disc disease, narrow foramenal stenosis of the  
 6 neck, chronic neck and shoulder pain, congenital hypoplasia of the right  
 7 thumb, right wrist pain stemming from a previous right wrist fracture,  
 8 and right carpal tunnel syndrome. Tr. at 6-8, AR 301-559. Mr. Anderson  
 9 manages his pain using a variety of medications including Hydrocodone,  
 10 Flexeril (muscle relaxant), and Naproxyn (anti-inflammatory). Tr. at 20.  
 11 Mr. Anderson also uses a heating pad and massage wand daily for his neck  
 12 pain and attends physical therapy for his neck and wrist. Tr. at 16-17,  
 13 20. Mr. Anderson needs to lie down and take at least one nap daily to  
 14 relax his neck. Tr. at 21-22.

16 According to Mr. Anderson's own testimony, he experiences  
 17 significant neck pain on a daily basis. Tr. at 18 (rating his average  
 18 daily pain at six or seven on a scale of ten). He notes that his neck  
 19 and shoulder muscles cramp when he stands for long periods of time and  
 20 lifting anything increases his pain. Tr. at 17. Mr. Anderson also  
 21 explains that he has a limited range of motion in his neck and even  
 22 sitting causes his neck to stiffen. Tr. at 19. Due to his thumb  
 23 deformity and wrist pain, Mr. Anderson also struggles to pick up objects  
 24 with his right hand and has pain in his right wrist every day. Tr. at

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27 <sup>1</sup> The facts are only briefly summarized. Detailed facts are  
 28 contained in the administrative hearing transcript, the ALJ's decision,  
 the parties' briefs, and the underlying records.

1 15-17. Due to his pain, Mr. Anderson reports that he can no longer work  
2 like he used to or engage in recreational activities, such as playing  
3 basketball, with his children. Tr. at 18. He claims that he would only  
4 be able to sit or stand at a job for 30 minutes before needing a break.  
5 Tr. at 19. Mr. Anderson does note, however, that he sometimes goes to  
6 the park with his daughter. Tr. at 21. In his Function Reports, Mr.  
7 Anderson reported being able to shop occasionally, take the garbage out,  
8 do laundry, socialize with family, read, and watch television.  
9 Administrative Record (AR) at 231-33.

10 Mr. Anderson has some employment history. Tr. at 58-61. He worked  
11 retail at Costco from 1999 to 2005. AR at 253. Then, from 2005 to 2010,  
12 Mr. Anderson worked in a variety of positions, including as a phone  
13 operator, a construction laborer, a quality control worker at a food  
14 production company, and a janitor at a retirement home. AR at 253-63;  
15 Tr. at 58-61. Mr. Anderson reports encountering problems at his last job  
16 as a food production assembly line worker because he requested too many  
17 breaks. Tr. at 54. Mr. Anderson has not worked since November 2010. AR  
18 at 253.  
19

20 **B. Procedural History**

21 On March 12, 2012, Mr. Anderson protectively filed for Disability  
22 Insurance Benefits and Supplemental Insurance Benefits. AR at 170-185.  
23 His alleged onset date is November 1, 2010. AR at 170, 177. On July 5,  
24 2012, Mr. Anderson's claim was denied. AR at 119-22. On October 24,  
25 2012, reconsideration was denied. AR at 127-28.  
26

27 On May 8, 2014, a hearing was held before ALJ Marie Palachuk. AR  
28 36. Mr. Anderson; Anthony Francis, an independent medical expert; and K.  
ORDER - 3

1 Diane Kramer, an independent vocational expert, testified. AR at 36. The  
2 ALJ determined that Mr. Anderson has the severe impairments of cervical  
3 spine degenerative disc disease with resulting chronic pain, status post  
4 right wrist fracture, and recent right-side carpal tunnel repair. AR at  
5 23. The ALJ determined, however, that Mr. Anderson's impairments do not  
6 meet or medically equal the severity of any listed impairments. AR at  
7 26. Despite his impairments, the ALJ also ultimately found that Mr.  
8 Anderson has the residual functional capacity to perform light work,  
9 except that he is further limited to (1) occasional lifting and carrying  
10 of up to 20 pounds and frequent lifting and carrying of up to 10 pounds;  
11 (2) standing and walking, with breaks, for only about six hours in an  
12 eight-hour workday; (3) sitting, with normal breaks, for about six hours  
13 in an eight-hour workday; (4) frequent climbing of ramps and stairs,  
14 balancing, stooping, kneeling, crouching, and crawling; (5) occasional  
15 climbing of ropes, ladders, or scaffolds; (6) occasional reaching  
16 overhead bilaterally; (7) occasional right non-dominant hand fingering  
17 and handling; and (8) avoiding concentrated exposure to temperature  
18 extremes and hazardous situations. AR at 26.

21 Based on this assessment, the testimony of the vocational expert,  
22 and Mr. Anderson's age, education, and work experience, the ALJ  
23 concluded Mr. Anderson can perform past relevant work as a food  
24 production worker and survey worker, and is therefore not disabled as  
25 defined by the Social Security Act. AR at 29.

26 On May 27, 2014, the Appeals Council denied review of the ALJ's  
27 decision. AR at 1-3. Mr. Anderson then filed this lawsuit, appealing the  
28

1 ALJ's decision. ECF No. 3. Subsequently, the parties filed the instant  
2 summary judgment motions. ECF Nos. 17 & 23.

3 **C. Disability Determination**

4 A "disability" is defined as the "inability to engage in any  
5 substantial gainful activity by reason of any medically determinable  
6 physical or mental impairment which can be expected to result in death  
7 or which has lasted or can be expected to last for a continuous period  
8 of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A),  
9 1382c(a)(3)(A). The decision maker uses a five-step sequential  
10 evaluation process to determine whether a claimant is disabled. 20  
11 C.F.R. §§ 404.1520, 416.920.

13 Step one assesses whether the claimant is engaged in substantial  
14 gainful activities during the relevant period. If he is, benefits are  
15 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the decision  
16 maker proceeds to step two.

17 Step two assesses whether the claimant has a medically severe  
18 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c),  
19 416.920(c). If the claimant does not have a severe impairment or  
20 combination of impairments, the disability claim is denied. If the  
21 impairment is severe, the evaluation proceeds to the third step.

23 Step three compares the claimant's impairment with a number of  
24 listed impairments acknowledged by the Commissioner to be so severe as  
25 to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404  
26 Subpt. P App. 1, 416.920(d). If the impairment meets or equals one of  
27 the listed impairments, the claimant is conclusively presumed to be  
28

1 disabled. If the impairment does not meet or equal one of the listed  
2 impairments, the evaluation proceeds to the fourth step.

3 Step four assesses whether the impairment prevents the claimant  
4 from performing work he has performed in the past. This includes  
5 determining the claimant's residual functional capacity. 20 C.F.R.  
6 §§ 404.1520(e), 416.920(e). If the claimant is able to perform his  
7 previous work, he is not disabled. If the claimant cannot perform this  
8 work, the evaluation proceeds to the fifth step.

9 Step five, the final step, assesses whether the claimant can  
10 perform other work in the national economy in view of his age,  
11 education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f);  
12 see *Bowen v. Yuckert*, 482 U.S. 137 (1987).

13 The burden of proof shifts during this sequential disability  
14 analysis. The claimant has the initial burden of establishing a prima  
15 facie case of entitlement to disability benefits. *Rhinehart v. Finch*,  
16 438 F.2d 920, 921 (9th Cir. 1971). The claimant meets this burden if he  
17 establishes that a physical or mental impairment prevents him from  
18 engaging in his previous occupation. The burden then shifts to the  
19 Commissioner to show (1) the claimant can perform other substantial  
20 gainful activity, and (2) a "significant number of jobs exist in the  
21 national economy" that the claimant can perform. *Kail v. Heckler*, 722  
22 F.2d 1496, 1498 (9th Cir. 1984). A claimant is disabled only if his  
23 impairments are of such severity that he is not only unable to do his  
24 previous work, but cannot – considering his age, education, and work  
25 experience – engage in any other substantial gainful work that exists in  
26 the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1       **D. Standard of Review**

2       On review, a court considers the record as a whole, not just the  
 3 evidence supporting the ALJ's decision. *Weetman v. Sullivan*, 877 F.2d  
 4 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526  
 5 (9th Cir. 1980)). A court must uphold the ALJ's determination that the  
 6 claimant is not disabled if the ALJ applied the proper legal standards  
 7 and there is substantial evidence in the record as a whole to support  
 8 the decision. *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)  
 9 (citing 42 U.S.C. § 405(g)); *Brawner v. Sec'y of Health & Human Servs.*,  
 10 839 F.2d 432, 433 (9th Cir. 1987) (recognizing that a decision supported  
 11 by substantial evidence will be set aside if the proper legal standards  
 12 were not applied in weighing the evidence and making the decision).  
 13 Substantial evidence is more than a mere scintilla, *Sorenson v.*  
 14 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a  
 15 preponderance, *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir.  
 16 1989); *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576  
 17 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind  
 18 might accept as adequate to support a conclusion." *Richardson v.*  
 19 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). Any inferences  
 20 and conclusions that the ALJ may reasonably draw from the evidence will  
 21 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). A  
 22 court must uphold the ALJ's decision, even if other rational  
 23 interpretations exist. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir.  
 24 1984).

25       //

26       /

1                   **E. Analysis**

2                   The Court addresses each of Mr. Anderson's challenges to the ALJ's  
 3 decision.

4                   **1. Medical Expert - Dr. Francis**

5                   Mr. Anderson contends that the ALJ erroneously failed to address  
 6 parts of Dr. Francis's testimony, despite the ALJ's acceptance of Dr.  
 7 Francis's testimony in full. ECF No. 17 at 4-5.

8                   The ALJ assigned "significant weight" to Dr. Francis's opinions  
 9 because he had an opportunity to objectively review all of the medical  
 10 evidence in the record, specialized in the relevant area as an  
 11 orthopedic surgeon, and his opinion was generally consistent with all  
 12 treating and examining opinions in the medical record. AR at 28. The ALJ  
 13 noted that the only opinion in the record that differed from Dr.  
 14 Francis's was that of Dr. Prakash, Mr. Anderson's treating physician.  
 15 AR at 28.

16                   As a general rule, the ALJ "need not discuss all evidence  
 17 presented to her," but "she must explain why significant probative  
 18 evidence has been rejected." *Vincent v. Heckler*, 739 F.2d 1393, 1394-95  
 19 (9th Cir. 1984) (internal quotation marks omitted). When the ALJ accepts  
 20 portions of a medical opinion, but rejects other portions, she must  
 21 provide an explanation for the variable treatment. *Craig v. Astrue*, 269  
 22 F. App'x 710, 712 (9th Cir. 2008) (rejecting the ALJ's credibility  
 23 determination in part because "the ALJ offered no reason why [the  
 24 medical] opinion was persuasive in one regard, but not the other"  
 25 (citing *Robinson v. Barnhart*, 366 F.3d 1078, 1083 (10th Cir. 2004));  
 26 *Switzer v. Heckler*, 742 F.2d 382, 385-86 (7th Cir. 1984) ("[T]he  
 27

1 Secretary's attempt to use only the portions [of a report] favorable to  
2 her position, while ignoring other parts, is improper."). "The ALJ is  
3 not entitled to pick and choose from a medical opinion, using only those  
4 parts that are favorable to a finding of nondisability." *Robinson*, 366  
5 F.3d at 1083.

6 Mr. Anderson argues that the ALJ improperly failed to consider  
7 portions of Dr. Francis's opinions, despite giving significant weight to  
8 his testimony and opinion as a whole. ECF No. 17 at 10-11. Specifically,  
9 Dr. Francis testified on cross-examination that he did not disagree with  
10 another professional's opinion in the record that Mr. Anderson may need  
11 to miss up to three days of work per month and would need to lie down  
12 occasionally during the day due to pain. Tr. at 14. When asked about the  
13 opinion, Dr. Francis stated:

14 "I mean that can be reasonable. I mean we're looking at a  
15 document that's almost a year old now. That apparently was  
16 that doctor's opinion. I don't have any reason to disagree  
17 with it though at that time."

18 Tr. at 14. This statement alone may not carry significant force due to  
19 its equivocal nature, but the findings regarding Mr. Anderson's need to  
20 miss work and need to lie down were essential to the vocational expert's  
21 determination that Mr. Anderson could perform past relevant work. Tr. at  
22 31-32. When questioned about whether an individual with Mr. Anderson's  
23 impairments could maintain employment if he needed to miss two or more  
24 days of work per month, the vocational expert indicated that such a  
25 person could not sustain competitive employment:

26 Claimant's Attorney: Ms. Kramer, if an individual were to  
27 miss work, due to their impairments, how  
28 many days could they miss per month and

1 still be able to sustain competitive  
2 employment?

3 Vocational Expert: Usual and customary is up to one per  
4 month within unskilled labor.

5 Claimant's Attorney: And if it's two or more per month, then  
6 they're most likely not going to be able  
7 to sustain competitive employment?

8 Vocational Expert: Correct.

9 Tr. at 31. The vocational expert further indicated that lying down during  
10 the workday would not be tolerated in a work environment. Tr. at 32.

11 Because Dr. Francis's statement regarding Mr. Anderson's need to  
12 miss work and lie down throughout the day, in combination with the  
13 vocational expert's testimony, was significant probative evidence of Mr.  
14 Anderson's inability to maintain employment and, thereby, of Mr.  
15 Anderson's disability, the ALJ was required to provide a reason for  
16 rejecting that portion of Dr. Francis's testimony. The ALJ gave  
17 significant weight to Dr. Francis's testimony and opinion generally. AR  
18 at 28. Thus, without refuting – or at least acknowledging – Dr. Francis's  
19 statement that it was possible Mr. Anderson would need to miss work and  
20 lie down throughout the day, there was no substantial evidence for the  
21 ALJ to reasonably conclude that Mr. Anderson was able to maintain  
22 employment, and the ALJ's findings indicate she may have engaged in  
23 impermissible cherry-picking. See *Craig*, 269 F. App'x at 712.

24 Therefore, the Court remands the case back to the ALJ to determine  
25 whether Mr. Anderson would need to miss work more than one day a month  
26 or lie down throughout the day due to his impairments and, if so,  
27 whether Mr. Anderson is disabled.

1           **2. Treating Physician Dr. Prakash**2           Mr. Anderson contends that the ALJ failed to properly consider the  
3 opinion of his treating physician, Dr. Prakash. ECF No. 17 at 12-13.4           The ALJ assigned "some weight" to Dr. Prakash's opinions because  
5 he was a treating source and his opinion was consistent with other  
6 opinions that Mr. Anderson could work at light levels, but had some  
7 right hand limitations. AR at 28. The ALJ noted that Dr. Prakash's  
8 opinion indicated Mr. Anderson could only lift and carry two pounds with  
9 his right upper extremity, but could carry 20 pounds with his left upper  
10 extremity and that Mr. Anderson could stand for six hours in an eight-  
11 hour workday. AR at 28.13           There are three type of physicians: treating physicians, examining  
14 physicians, and nonexamining physicians. *Lester v. Chater*, 81 F.3d 821,  
15 830 (9th Cir. 1995). "As a general rule, more weight should be given to  
16 the opinion of a treating source than to the opinion of doctors who do  
17 not treat the claimant." *Id.* The ALJ must provide "clear and convincing"  
18 reasons for rejecting a treating or examining physician's opinions and  
19 may not reject such opinions without providing "specific and legitimate  
20 reasons" supported by substantial evidence in the record for so doing.  
21  
*Id.*23           Mr. Anderson argues that the ALJ improperly failed to credit the  
24 opinion of Dr. Prakash without meeting the standard required in *Lester*  
25 when the ALJ did not expressly find that Mr. Anderson could only lift two  
26 pounds with his right hand. ECF No. 17 at 12-13. As the petitioner notes,  
27 however, the ALJ did not reject Dr. Prakash's opinion. ECF No. 17 at 12-  
28 13. In fact, it is not clear that the ALJ's findings are inconsistent

1 with Dr. Prakash's opinion. AR at 26. The ALJ found that Mr. Anderson  
2 could lift 20 pounds occasionally and 10 pounds frequently, but did not  
3 distinguish between Mr. Anderson's use of his right and left hands. AR at  
4 26.

5 Mr. Anderson contends that the ALJ's failure to distinguish between  
6 the functioning of Mr. Anderson's hands was problematic because the ALJ's  
7 hypothetical given to the vocational expert did not differentiate between  
8 Mr. Anderson's ability to lift with each hand. It is true that "the  
9 hypothetical posed must include 'all of the claimant's functional  
10 limitations, both physical and mental' supported by the record." *Thomas*  
11 *v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002). Although the hypothetical  
12 did not distinguish between Mr. Anderson's ability to lift with each  
13 hand, the ALJ accounted for the different functioning levels of Mr.  
14 Anderson's hands by including limitations on Mr. Anderson's ability to  
15 handle and finger with the right hand. Tr. at 30-31.

16 Accordingly, the Court finds that the ALJ did not err with respect  
17 to her consideration of Dr. Prakash's opinion and that the ALJ's  
18 hypothetical given to the vocational expert adequately described Mr.  
19 Anderson's impairments.

20 **3. Past Relevant Work Analysis**

21 Mr. Anderson also contends that in addition to the stage four  
22 errors in the ALJ's analysis outlined above in Section 1, the ALJ  
23 committed factual and legal errors in evaluating whether Mr. Anderson  
24 had past relevant work to which he could return. ECF No. 17 at 14-17.  
25 Mr. Anderson claims that the two jobs identified by the vocational  
26 expert as jobs to which Mr. Anderson could return – food production  
27  
28

1 worker and survey worker – are not qualifying past relevant work because  
2 they were not performed at “substantial gainful activity levels.” ECF  
3 No. 17 at 14.

4 In order for a position to qualify as substantial gainful activity  
5 in 2009 and 2010 – the years Mr. Anderson was working as a food  
6 production worker or survey worker – an individual had to earn \$980 per  
7 month and \$1000 per month, respectively, in that position. Social  
8 Security Administration, Program Operations Manual Systems, Tbl. DI  
9 10501.015. To assess whether a position constitutes substantial gainful  
10 activity, the Social Security Administration Operations Manual notes  
11 that in calculating gross earning, it is essential to: “Develop enough  
12 evidence to determine the actual period worked and the earnings for that  
13 period.” Social Security Administration, Program Operations Manual  
14 Systems, DI 10505.001(B)(1).

16 Mr. Anderson argues that he did not earn enough as a food  
17 production worker or survey worker to meet the earning requirement for  
18 substantial gainful activity. ECF No. 17 at 14-17. The Commissioner  
19 seems to concede that Mr. Anderson’s former position as a survey worker  
20 did not qualify as substantial gainful activity. ECF No. 23 at 11-13.  
21 The Commissioner contests, however, whether the food production worker  
22 position qualifies. ECF No. 23 at 11-13.

24 The record contains conflicting reports about how long Mr.  
25 Anderson worked as a food production worker. Mr. Anderson worked in that  
26 position as part of his employment with a temp agency, Manpower  
27 International Inc. According to Mr. Anderson’s work history report, he  
28 worked at the temp agency from June 2008 through September 2010. AR 253.

1 In another filing, Mr. Anderson noted that during his time with the temp  
2 agency he worked "mostly at Lamb Weston quality control packaging hash  
3 browns" but also worked other jobs. AR 255. In his testimony before the  
4 ALJ, Mr. Anderson indicated that he worked at Lamb Weston for only 90  
5 days total. Tr. at 59. Mr. Anderson's earning statements from Manpower  
6 International do not distinguish between different job placements and  
7 include only a total for each year of employment with the agency. AR  
8 190-92.

9  
10 When calculating his average monthly earnings while working at  
11 Lamb Weston, Mr. Anderson divided the total amount earned at Manpower  
12 for each year by the number of months he worked for Manpower  
13 International that year. Using such a calculation, Mr. Anderson  
14 determined that he earned \$213.16 per month in 2009 and \$207.50 per  
15 month in 2010. ECF No. 17 at 16. The Commissioner used a different  
16 calculation, dividing the total amount Mr. Anderson earned at Manpower  
17 International from 2009 and 2010 by the three months Mr. Anderson  
18 testified that he worked at Lamb Weston. ECF No. 23 at 12. Using this  
19 calculation, the Commissioner determined that Mr. Anderson earned \$1,475  
20 per month during his time at Lamb Weston. ECF No. 23 at 12.

21  
22 Both of these methods of calculation are flawed. Without knowing  
23 which time periods Mr. Anderson spent working at Lamb Weston, rather  
24 than at Manpower International generally, it is impossible to determine  
25 the amount of his Manpower International earnings that are attributable  
26 to his work at Lamb Weston. Moreover, as demonstrated by the significant  
27 discrepancy between Mr. Anderson's calculation and the Commissioner's  
28 calculation, it is impossible to determine how much Mr. Anderson earned

1 per month during his time at Lamb Weston without evidence of how long  
2 Mr. Anderson actually worked there. With the contradicting and  
3 incomplete evidence in the record, it is impossible to determine whether  
4 Mr. Anderson's position as a food production worker qualified as  
5 substantial gainful activity.

6 Therefore, the Court remands the case back to the ALJ to determine  
7 how long Mr. Anderson worked at Lamb Weston and how much he earned  
8 during that time. Then, the ALJ shall determine whether Mr. Anderson's  
9 position as a food production worker qualified as substantial gainful  
10 activity.

12 **4. Mr. Anderson's Testimony**

13 Mr. Anderson argues the ALJ's credibility assessment is legally  
14 insufficient because when the ALJ determined that Mr. Anderson was not  
15 fully credible, she did not demonstrate that the medical evidence was  
16 inconsistent with Mr. Anderson's testimony or that Mr. Anderson's  
17 activities were inconsistent with his claims.

18 A two-step analysis is used by the ALJ to assess whether a  
19 claimant's testimony regarding subjective pain or symptoms is credible.  
20 *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). Step one requires  
21 the ALJ to determine whether the claimant presented objective medical  
22 evidence of an impairment that could reasonably be expected to produce  
23 some degree of the pain or other symptoms alleged. *Lingenfelter v.*  
24 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d  
25 1273, 1282 (9th Cir. 1996). Objective medical evidence of pain or  
26 fatigue, or the severity thereof, need not be provided by the claimant.  
27 *Garrison*, 759 F.3d at 1014.

1       If the claimant satisfies the first step of this analysis, and  
2 there is no evidence of malingering, the ALJ must accept the claimant's  
3 testimony about the severity of his symptoms unless the ALJ provides  
4 specific, clear, and convincing reasons for rejecting the claimant's  
5 testimony. *Id.* An ALJ is not "required to believe every allegation of  
6 disabling pain" or other non-exertional impairment. *Orn v. Astrue*, 495  
7 F.3d 625, 635 (9th Cir. 2007). To discredit a claimant's testimony when a  
8 medical impairment has been established, however, the ALJ must provide  
9 specific, cogent reasons for the disbelief. *Id.* Factors that an ALJ may  
10 consider in weighing a claimant's credibility include reputation for  
11 truthfulness, inconsistencies in testimony or between testimony and  
12 conduct, daily activities, and unexplained, or inadequately explained,  
13 failure to seek treatment or follow a prescribed course of treatment. *Id.*

15       Here, the ALJ found that Mr. Anderson did suffer from severe  
16 musculoskeletal impairments and recognized that his impairments could  
17 cause the alleged symptoms. AR at 26-27. She then determined, however,  
18 that Mr. Anderson's statements concerning the intensity, persistence, and  
19 effects of his symptoms were not fully credible. AR at 27. The ALJ  
20 explained that the medical opinions did not support the level of  
21 limitation alleged by Mr. Anderson because the opinions supported an  
22 ability to perform light work. AR at 27. In addition, the ALJ concluded  
23 that Mr. Anderson's reported activities of daily living did not support  
24 the level of limitation claimed because Mr. Anderson "cares for his  
25 children and accompanies his daughter on outings to the park," and he  
26 submitted Function Reports indicating that he could "cook simple meals,  
27

1 shop, do laundry, socialize, read, and likes to watch sports related  
2 television." AR at 27.

3 The explanation provided by the ALJ for rejecting Mr. Anderson's  
4 testimony does not include the kind of "clear, convincing, and specific  
5 reason[s]" required to discredit a social security claimant. *Garrison*,  
6 759 F.3d at 1016. The ALJ did not explain how Mr. Anderson's claims  
7 differed from the level of functioning described by the medical opinions,  
8 stating only "claimant's subjective complaints are partially credible  
9 because medical opinions addressed above do not support the level of  
10 limitations alleged." The ALJ noted an inconsistency with the physical  
11 therapist's opinion that Mr. Anderson could perform light to medium work,  
12 AR at 27, but subsequently noted that she was giving the physical  
13 therapist's opinion "little weight." AR at 28. The ALJ also cited to  
14 opinions by Dr. Francis and Dr. Valencia that Mr. Anderson could perform  
15 light work as evidence of inconsistency, AR at 27, but the ALJ later  
16 noted that she only gave Dr. Valencia's opinion "some weight" because it  
17 was "silent as to any residual right hand limitations which discounts its  
18 probative value in this case." AR at 28. Accordingly, if Mr. Anderson's  
19 alleged severity of symptoms was inconsistent with the opinions of the  
20 physical therapist and Dr. Valencia, given the low weight attributed to  
21 each expert's opinion it is unclear that such an inconsistency is  
22 sufficient to discredit Mr. Anderson.

23 Although the ALJ gave Dr. Francis's opinion significant weight, it  
24 is important to note that Dr. Francis did not unequivocally state that a  
25 light level of work was appropriate. Dr. Francis stated: "Most RFCs  
26 [residual functional capacities] in a chronic pain case are going to fall  
27

1 either light, sedentary or less than sedentary." Tr. at 8. Dr. Francis  
2 concluded that "probably a light RFC would be appropriate here, but I'm  
3 willing to discuss it." Tr. at 9. It is therefore unclear whether there  
4 is a meaningful inconsistency between Dr. Francis's opinion and Mr.  
5 Anderson's testimony so as to justify discrediting Mr. Anderson.  
6

7 It is also unclear that Mr. Anderson's described daily activities  
8 are inconsistent with the level of impairment alleged. While the ALJ  
9 stated that Mr. Anderson could "cook simple meals," Mr. Anderson  
10 specifically noted in his Function Report that he did not cook at all,  
11 stating: "[I]t is painful to stand over the stove for a long period of  
12 time, so my mother prepares all the meals." AR at 231. There is no  
13 contradictory evidence in the record to suggest that Mr. Anderson cooks.  
14 In addition, the ALJ noted that Mr. Anderson cares for his children, but  
15 there is no indication in the record that Mr. Anderson performs childcare  
16 activities. Mr. Anderson indicated that he lives alone and does not  
17 reside with his children. AR at 178. In his Function Report, Mr. Anderson  
18 reported that he does not care for any children. AR at 230. Mr. Anderson  
19 testified that he is no longer able to play with his sons, but did not  
20 say anything regarding care of his children. Tr. at 18.

22 Mr. Anderson did indicate in his testimony that he walks with his  
23 daughter to the park occasionally, Tr. at 21, but that is not  
24 inconsistent with his Function Report statement that he can walk about a  
25 half of a mile before resting and then only needs to rest for five  
26 minutes. AR at 234. Mr. Anderson also indicated in his Function Reports  
27 that he could take the garbage out and does laundry, but that it "takes  
28 [him] a little longer than it use to" and he only performs those

1 activities about twice a week. AR at 231. Mr. Anderson indicated the he  
2 does not do any other housework "like dishes or yardwork" because  
3 "standing and movement in neck is too painful to do for an extended  
4 period." AR at 232. Mr. Anderson also indicated that he shops, but only  
5 once a month for about an hour. AR at 232. Although Mr. Anderson also  
6 indicated that he likes to read and watch sports on television, he also  
7 noted that he has to take breaks from those activities in order to "give  
8 [his] neck a rest from being in one position." AR at 233. Mr. Anderson  
9 also testified that he needs to nap at least once a day and massage his  
10 neck throughout the day in order to relax his neck muscles. Tr. at 21-22.

12 It is important to recognize that "many home activities may not be  
13 easily transferable to a work environment where it might be impossible to  
14 rest periodically or take medication." *Smolen*, 80 F.3d at 1284 n.7; see  
15 also *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) ("[M]any home  
16 activities are not easily transferable to what may be the more grueling  
17 environment of the workplace[.]"). "[I]mpairments that would  
18 unquestionably preclude work and all the pressures of a workplace  
19 environment will often be consistent with doing more than merely resting  
20 in bed all day." *Garrison*, 759 F.3d at 1016. Accordingly, the ability to  
21 perform some tasks that are consistent with tasks performed at a job does  
22 not necessarily mean that an individual is able to perform those tasks on  
23 a consistent basis in a work environment.

25 In this case, Mr. Anderson's described activities – doing laundry  
26 twice a week, taking out the trash twice a week, shopping once a month,  
27 reading and watching television with periodic breaks, and occasionally  
28 taking his daughter to the park – do not necessarily demonstrate an

1 ability to work eight hours a day in a work environment. As discussed  
2 above in Section 1, Mr. Anderson would not be able to take frequent  
3 breaks or naps at work. His ability to perform tasks twice a week is not  
4 evidence of an ability to perform similar tasks repeatedly throughout the  
5 day. The Commissioner claims that Mr. Anderson's testimony regarding  
6 difficulty using his right hand is inconsistent with doing laundry, ECF  
7 No. 23, at 7, but there is no evidence that Mr. Anderson uses his right  
8 hand when doing laundry. The Commissioner also argues that Mr. Anderson's  
9 ability to accompany his daughter to the park is inconsistent with his  
10 claim that he has difficulty sitting or standing for more than 30  
11 minutes, ECF No. 23, at 7, but there is no evidence that Mr. Anderson  
12 must sit or stand for more than 30 minutes without a break during such  
13 outings. Accordingly, the evidence clearly indicates that Mr. Anderson's  
14 described daily activities are consistent with the severity of the  
15 symptoms alleged.

16  
17 Therefore, the Court remands the case back to the ALJ to make  
18 specific findings as to whether Mr. Anderson's alleged impairment is  
19 inconsistent with medical opinions to which the ALJ has given weight and  
20 then consider whether Mr. Anderson is disabled, giving appropriate credit  
21 to Mr. Anderson's testimony.

22 **C. Conclusion**

23 For the above-given reasons, the Court remands the case for  
24 further proceedings. Although the Court holds that the ALJ erred, it is  
25 not clear from the record, as it currently stands, whether Mr. Anderson  
26 is disabled or whether he has qualifying past relevant work to which he  
27 could return. The ALJ shall consider Dr. Francis's statement regarding  
28

1 Mr. Anderson's possible need to lie down during the work day or miss  
2 work due to pain. In addition, the ALJ shall consider whether Mr.  
3 Anderson's position as a food production worker met the standard for  
4 substantial gainful activity. The Commissioner has conceded that Mr.  
5 Anderson's position as survey worker did not meet that standard, so an  
6 additional consideration of that position is unnecessary. The ALJ shall  
7 also reevaluate Mr. Anderson's credibility given the Court's  
8 determination that Mr. Anderson's daily activities are not inconsistent  
9 with the level of impairment alleged.

11 The Court holds that the ALJ did not fail to properly consider Dr.  
12 Prakash's opinion. Therefore, the ALJ does not need to reevaluate or  
13 reweigh that opinion.

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Mr. Anderson's Motion for Summary Judgment, **ECF No. 17**, is  
3 **GRANTED IN PART and DENIED IN PART.**

4 2. The Commissioner's Motion for Summary Judgment, **ECF No. 23**,  
5 is **DENIED**.

6 3. This matter is **REMANDED** to the Commissioner for additional  
7 proceedings consistent with this Order.

8 4. The Clerk's Office is to enter **Judgment** in favor of Mr.  
9 Anderson.

10 5. An application for attorney fees may be filed by separate  
11 motion by Mr. Anderson.

12 6. The case shall be **CLOSED**.

13 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this  
14 Order and provide copies to counsel and ALJ Marie Palachuk.

15 **DATED** this 27<sup>th</sup> day of September 2016.

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s/Edward F. Shea

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EDWARD F. SHEA  
20 Senior United States District Judge  
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